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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81 5840

CURFEW DAVIS,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Citations to Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Question Presented	2
How the Issue was Raised Below	3
Statement of the Case	3
Reasons for Granting the Writ	4
Georgia Code Ann. §38-801(d), requiring the tender of attendance and mileage fees with a witness subpoena, denied Petitioner, an indigent death row inmate in a state habeas corpus proceeding, equal protection of the meaningful access to the court and compulsory process to compel the attendance of witnesses in his behalf as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States	4
Conclusion	9

TABLE OF AUTHORITIES

Cases	Pages
Bounds v. Smith, 420 U.S. 817 (1977)	5
Davis v. Georgia, 439 U.S. 122 (1976)	3
Davis v. State, 326 Ga. 804, 225 S.E.2d 241 (1976)	3
Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978)	3
Douglas v. California, 372 U.S. 353 (1963)	5
Griffin v. Illinois, 351 U.S. 12 (1956)	6
Lawrence v. Henderson, 344 F.Supp. 1287 (E.D. La. 1972)	5
Smith v. Bennett, 365 U.S. 708 (1961)	6
Stone v. Powell, 428 U.S. 465 (1976)	7
Washington v. Texas, 388 U.S. 14 (1967)	5
Webb v. Texas, 409 U.S. 95 (1972)	5
Woodson v. North Carolina, 428 U.S. 280 (1976)	8
Constitutional Amendments	
Fourth Amendment	7
Sixth Amendment	2, 4, 8
Eighth Amendment	2, 4, 8
Fourteenth Amendment	2, 4, 5, 8
Statutes	
28 U.S.C. §1257(3)	1
28 U.S.C. §2254	7
Ga. Code Ann. §24-4526	2
Ga. Code Ann. §26-1101	2
Ga. Code Ann. §38-801	2, 3, 4, 5,
Ga. Code Ann. §50-127	2, 5

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner, Curfew Davis, prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia entered on July 17, 1981. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia September 8, 1981.

CITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on September 8, 1981. The order of the Supreme Court of Georgia and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied September 8, 1981. Pursuant to Rule 20 of the Rules of the Supreme Court, the time for this Petition runs from the denial of review issued by the Supreme Court of Georgia on September 8, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §24-4526

Georgia Code Ann. §26-1101

Georgia Code Ann. §38-801(d)

Georgia Code Ann. §50-127

QUESTION PRESENTED

Whether Georgia Code Ann. §38-801(d), requiring the tender of attendance and mileage fees with a witness subpoena, denied Petitioner, an indigent death row inmate in a state habeas corpus proceeding, equal protection of the law, meaningful access to the courts and compulsory process to compel the attendance of witnesses in his behalf as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. and would result in the arbitrary and capricious infliction of the death penalty in this case in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

HOW THE ISSUE WAS RAISED BELOW

Prior to the hearing on Petitioner's state petition for writ of habeas corpus, Petitioner moved the habeas corpus court to declare Georgia Code Ann. §38-801(d) unconstitutional as applied to Petitioner. [A copy of the motion is attached hereto as Appendix D]. The court denied the motion. The constitutional issues were raised again on application for certificate of probable cause to appeal in the Georgia Supreme Court.

STATEMENT OF THE CASE

Curfew Davis was convicted of murder and sentenced to death in the Superior Court of Troup County, Georgia; the conviction and sentence were affirmed by the Georgia Supreme Court. Davis v. State, 326 Ga. 804, 225 S.E.2d 241 (1976).

Subsequently, Petitioner's death sentence was vacated by the United States Supreme Court. Davis v. Georgia, 439 U.S. 122 (1976).

On retrial on sentencing only, Petitioner was again sentenced to death; the sentence was affirmed by the Georgia Supreme Court. Davis v. State, 241 Ga. 376
Certiorari was denied by the United States Supreme Court.

Prior to the habeas corpus hearing, Petitioner moved the court to declare unconstitutional Georgia Code Ann. §38-801(d) insofar as it required Petitioner, an indigent death row inmate, to tender witness and mileage fees with any subpoena for the habeas corpus hearing. The motion was denied.

Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County on February 13, 1981.

The Superior Court of Butts County denied habeas corpus relief on July 17, 1981 in an unreported decision. On September 8, 1981, the Georgia Supreme Court denied a timely application for certificate of probable cause to appeal.

REASONS FOR GRANTING THE WRIT

1. GEORGIA CODE ANN. §38-801(d), REQUIRING THE TENDER OF ATTENDANCE AND MILEAGE FEES WITH A WITNESS SUBPOENA, DENIED PETITIONER, AN INDIGENT DEATH ROW INMATE IN A STATE HABEAS CORPUS PROCEEDING, EQUAL PROTECTION OF THE MEANINGFUL ACCESS TO THE COURT AND COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES IN HIS BEHALF AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner, an indigent death row inmate, sought habeas corpus review in state court of his conviction and death sentence. The issues raised in the habeas corpus petition required the presentation of evidence from witnesses who would not attend an evidentiary hearing without subpoenas. Under the statute in Georgia, witnesses must be tendered subpoena fees and mileage before a valid subpoena can be issued. Ga. Code Ann. §38-801(d).

The State stipulated with the Petitioner that, "If they (Petitioner's counsel) had funds, they could make subpoenas binding and make these people come to appear before you (the court)". The State further stipulated that the witnesses were needed to testify concerning the allegations of the petition. [See attached Appendix E].

The Petitioner's motion for subpoena funds was denied by the habeas corpus court.

Due process may not require the Georgia legislature to institute the post-convicton procedure in Georgia Code Ann. §50-127. However, once provided, this procedure mus be administered to provide a full and fair hearing and comport with the principles of Fourteenth Amendment due process and equal protection. Douglas v. California, 372 U.S. 353 (1963). The action of the Georgia habeas corpus court denying Petitioner's motion deprived Petitioner of meaningful access to the state habeas corpus proceeding. Bounds v. Smith, 420 U.S. 817 (1977).

"The right to offer the testimony of witnesses and to compel their attendance if necessary . . . is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972). The Georgia Code Ann. §38-801(d) requires witness and mileage fees to be tendered with a subpoena if the subpoena is to be enforcemable. Thus, an indigent is deprived of the right to compulsory process.

In Lawrence v. Henderson, 344 F.Supp. 1287 (E.D. La. 1972), prison officials had refused to allow inmates served with subpoenas by a defendant to comply with the subpoenas. In holding these facts to constitute a violation of the right to compulsory process, the District Court stated:

> The record is barren as to the reason for the denial of compulsory process. Petitioner may have had it denied him through inadvertance or other innocent reason. The cause of the denial, however, is immaterial. It is the resulting inability to compel [the witness] to testify which is unconstitutional.
>
> 344 F.Supp. at 1295.

The ability to compel the attendance of witnesses is essential if Petitioner is to present the merits of his habeas corpus petition in the habeas proceeding. The record of his trial and direct appeal are of little value in the post-conviction proceeding, without supplementation by testimony from witnesses.

A petitioner must be able to present witnesses to substantiate newly discovered and often complex claims with respect to the unconstitutionality of his conviction and sentence. Without the funds to subpoena witnesses, the post-conviction procedure is but a legal fiction for the indigent petitioner.

In a long series of cases, this Court has invalidated processes which denied the poor access to the courts or made that access ineffectual. In Griffin v. Illinois, 351 U.S. 12 (1956), this Court mandated that an indigent be provided the necessary transcripts to pursue an appeal; in Burns v. Ohio, 360 U.S. 252 (1959), the Court struck down a scheme which required an individual to pay filing fees as a prerequisite to prosecuting the appeal. In Smith v. Bennett, 365 U.S. 708 (1961), the Court struck down a scheme which denied indigents access to the courts for the purposes of seeking collateral review unless a filing fee could be paid. In each of these cases, the impediment to access to the judicial system was clearly cost.

In the present case, the Georgia law restricting Petitioner's ability to compel the attendance of witnesses created a de facto barrier to Petitioner's assertion of his constitutional claims and rendered meaningless the formal access to post-conviction relief afforded him.

The Georgia habeas corpus procedure is a procedure that Petitioner must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The procedure in a United States District Court is set forth in a law enacted by Congress, 28 U.S.C. §2254 which provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

The State habeas corpus proceeding may finally determine Fourth Amendment constitutional claims, Stone v. Powell, 428 U.S. 465 (1976), and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction . . shall be presumed to be correct. . ." in the federal proceeding. 28 U.S.C. §2254(d).

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of

legislative intent included with 1967 Ga. Laws, p. 835, et seq., a complete revision of the habeas corpus statute:

> Section 1. Statement of Legislative Intent and Purpose.
>
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court, together with other decisions of said court (a) substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this State; that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioration of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases.

The deprivation of Petitioner's right to due process and equal protection of law must be given the special scrutiny peculiar to cases where death is the penalty. "Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Georgia habeas corpus review must not be administered so as to deprive Petitioner, an indigent under death sentence, of an opportunity to litigate his constitutional claims. Georgia Code Ann. §38-801(d) deprives Petitioner of meaningful access to the courts in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing petition for writ of certiorari on counsel for the opposing party by placing a copy of the same in the United States Mail with adequate first-class postage attached thereto addressed to Mr. Michael J. Bowers, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 1st day of December, 1981.

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Application No. 1764

SUPREME COURT OF GEORGIA

Atlanta, September 8, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CURFEW DAVIS V. WALTER B. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. Jordan, C.J., Marshall, Clarke, Smith and Gregory, JJ., concur. Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CURFEW DAVIS,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 4962
WALTER D. ZANT, SUPERINTENDENT GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death sentence by the Superior Court of Troup County. Davis was convicted of Murder and sentenced to death. His conviction and sentence were affirmed by the Supreme Court. Davis v. State, 236 Ga. 804 (1976). The conviction was affirmed but the death sentence vacated by the Supreme Court of the United States so that the case was remanded to the Superior Court for a new trial on the sole issue of punishment. Davis v. State, 238 Ga. 295 (1977). On retrial Petitioner was resentenced to death and the Supreme Court affirmed. Davis v. State, 241 Ga. 376 (1978). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 30 numbered counts which allege substantive claims for relief. The Court will rule on those counts for relief by paragraphs corresponding numerically to the counts in the Petition.

The record in this habeas case consists of the transcript of proceedings before this Court on April 2, 1981, and the transcripts and record of both trials in Troup County Superior Court.

1.

In Count 1, Petitioner claims he was denied effective assistance of counsel in his first trial in violation of his constitutional rights.

At the habeas hearing the Court heard testimony from Mr. James Weldon, counsel for Petitioner at his first trial. Mr. Weldon has been in private practice in LaGrange, Georgia, for 31 years. (H.T. 31). He estimated that he had handled 30 murder cases prior to Petitioner's, some of which were death penalty cases. (H.T. 40).

The Court has examined the following allegations of ineffective assistance and found them to be without merit.

(1) Counsel conducted no proper independent investigation of facts and failed to interview witnesses.

Counsel testified that he investigated Petitioner's version of events, that Petitioner did not commit the murder but was with those who did, (H.T. 20), but was never able to corroborate the story. (H.T. 42). He

APPENDIX B, p. 2

was able to locate one of the two alleged perpetrators, JoAnn Porter, but she knew nothing. (H.T. 19). He was never able to locate the other alleged perpetrator, Lewis. (H.T. 20). Counsel also had a law enforcement officer take him to the site where the victim's body had been concealed after his initial efforts failed. (H.T. 17). He also had access to the prosecution's files. (H.T. 43). He discussed potential witnesses with Petitioner but was never able to secure any witnesses. (H.T. 22).

(2) Counsel failed to consult with Petitioner adequately before trial.

Counsel stated that he knew Petitioner and his family and talked to him "a whole lot of times." (H.T. 15). He said they discussed procedures, whether Petitioner would testify, and potential witnesses though counsel was never able to secure any. (H.T. 22).

(3) Counsel failed to investigate evidence or present evidence on Petitioner's behalf.

See (1) and (2) above. Additionally, counsel stated that Petitioner refused to testify on his own behalf. (H.T. 46).

(4) Counsel filed no challenge to the array of grand and traverse jury pools.

Counsel testified that during his lengthy practice, he had seen the change from all-male juries and knew women and blacks were on juries in Troup County. (H.T. 37-38). He stated that it never occurred to him to file a challenge. (H.T. 39).

Moreover, failure to challenge arrays of grand and traverse juries alone is not a ground of ineffective

APPENDIX B - p. 3

assistance or "cause" within the meaning of Ga. Code Ann. §50-127(1). Goodwin v. Hopper, 243 Ga. 193(2) (1978); Birt v. Hopper, 245 Ga. 221(2)(1980).

(5) Counsel filed no pretrial motions.

Counsel recalled preparing a Motion for Change of Venue, but Petitioner preferred being tried in Troup County. (H.T. 44). He thought that filing a Motion to Suppress would be fruitless. (H.T. 16). He thought he discussed other motions with Petitioner. (H.T. 22).

Petitioner has not demonstrated that a Motion to Suppress would have been good or that trial counsel's decision not to file such a Motion was not reasonable. For example, a pistol was seized and used against Petitioner but the evidence shows consent to the search and seizure of the pistol. Davis v. State, at p. 805.

Decisions on what trial motions should be made are within the realm of strategies and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975); Fortson v. State, 240 Ga. 5 (1977). That Petitioner's current counsel disagree with trial counsel's decisions does not require a finding of ineffective assistance, Berryhill v. Ricketts, 242 Ga. 447(3)(1978), particularly where Petitioner cannot show that he was harmed by the tactical decisions made.

(6) Trial counsel failed to conduct an adequate voir dire examination.

APPENDIX B - p.4

Counsel recalled a lot of strikes, a lot of questions, and prospective jurors were individually questioned on voir dire. (H.T. 23). His thinking there was reversible error during voir dire because some jurors were excused for cause (H.T. 45) in violation of Witherspoon[1] were borne out by the United States Supreme Court vacating Petitioner's first death sentence on this ground. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). What jurors to accept or strike being well within trial counsel's discretion, Reid v. State, the Court does not find that counsel's voir dire examination amounted to ineffective assistance.

(7) Counsel failed to move for a change of venue. See (5) above.

(8) Counsel failed to ask the Court for funds for expert witnesses and later testified that such witnesses were needed.

Counsel testified that the general practice in the circuit at that time was to provide funds only for attorney's fees. (H.T. 37). However, he thought everything was being covered adequately. Id.

This claim is too speculative to give Petitioner any valid constitutional claim. It is without merit.

(9) Counsel failed to move to suppress a pistol seized from Petitioner's residence.

Petitioner's girlfriend, with whom he lived,

---

[1] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

APPENDIX B-p.5

consented to the search of her home. Davis v. State, 236 Ga. at 805. There is no evidence to indicate her consent was not valid.

(10) Counsel failed to move to suppress Petitioner's statements obtained pursuant to an illegal arrest.

There is no evidence to indicate Petitioner's arrest was in any way illegal.

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's counsel meets this test. He was experienced in the trial of criminal cases. He prepared for and advocated Petititoner's cause in a reasonably effective manner. While it may be true that counsel put up a relatively scant defense, the finest lawyer in the country could not put up a defense that did not exist. The effort counsel put forth was certainly reasonably effective within the meaning of the standard.

Accordingly, Petitioner's first count is found to be without merit.

2.

(A) Petitioner contends his right to a fair trial was violated because Judge Joseph Jackson denied his Motion to Recuse Judge Lamar Knight.

APPENDIX B- p. 6

(B) While there is no clearly announced rule in this State that a defendant waives an objection of this kind by by-passing it on direct appeal, the Court is of the view that justice requires a ruling that Petitioner in this case has waived his objection to the denial of his recusal motion. Petitioner has kept the same counsel from the denial of the Motion to the present time. He is perhaps the most able lawyer in this State on cases of this genre. To entertain on habeas corpus a point deliberately abandoned on direct appeal is inappropriate where the Court can conclude, as it does here, that the failure to urge the point on direct appeal was knowing and deliberate.

(C) Irrespective of waiver, however, viewed against the subsequently articulated standard in Fleming v. State, 245 Ga. 700 (1980), the referral of the Motion by Judge Knight to Judge Jackson was proper. There is no reason given that Judge Jackson did not properly use the discretion given in such matters in denying the Motion to Recuse Judge Knight. A few intemperate remarks by the Court do not deprive the proceeding of fairness.

APPENDIX B- p. 7

3.

In Count 3, Petitioner challenges the application of the Ga. Code Ann. §27-2434.1(b)(7) aggravating circumstance. The Supreme Court has already concluded the aggravating circumstances are supported by the evidence. Davis v. State, 241 Ga. at 386.

4.

In Count 4, Petitioner questions the constitutionality of the introduction of his prior convictions as a basis for the Ga. Code Ann. §27-2534.1(b)(1) aggravating circumstance. The Supreme Court has already concluded the prior convictions were properly admitted. Davis v. State, 241 Ga. at 383-384.

5.

In Count 5, Petitioner alleges the jury charge in the guilt/innocence phase created an unconstitutional presumption as to the element of malice and thereby impermissibly shifted the burden of proof to Petitioner.

In this case the trial judge charged the jury on the definitions of express and implied malice. (T. 1st Trial 175; 179). The judge further charged the jury:

> "There can be no Murder under the laws of this state without malice, either expressed or implied. The law presumes it to be malice until the contrary appears from circumstances of alleviation or excuse, or justification and under the laws it is incumbent upon the Defendant to make out

APPENDIX B-p.8

such circumstances
satisfactory to the Jury
unless they appear from
the evidence offered
against the Defendant.

Ladies and Gentlemen, while
it is true that the law
presumes malice when a
homicide has been shown,
yet that presumption of
malice may be rebutted
by the Defendant from
evidence offered by him,
or from evidence offered
by the State, or from both."

(T. 1st Trial, 179).

Upon a consideration of the charge as a whole, a reasonable juror would not interpret the charge on malice as either conclusive or burden-shifting. It therefore does not violate Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Pulliam v. Balkcom, 245 Ga. 99(3)(1980).

Accordingly, the allegation in Count 5 is found to be without merit.

6.

Petitioner in Count 6 alleges his statements to law enforcement officers were illegally obtained and, in turn, improperly admitted.

The trial court conducted a Jackson-Denno hearing to determine the voluntariness of Petitioner's statements and admitted them into evidence after the State met its burden of showing voluntariness. (T. 1st Trial, 55-79). Petitioner has made no showing to indicate the trial court's determination was erroneous. In these circumstances, the determination of admissibility by the trial court is accepted. Johnson v. State, 233 Ga. 58 (1974); Hance v. State, 245 Ga. 856 (1980).

APPENDIX - B. - p. 9

The complaint in Count 6 is found to be without merit.

7.

In Count 7, Petitioner contends the alleged murder weapon was illegally seized and thus improperly admitted, violating his Fourth, Eighth, and Fourteenth Amendment rights.

The evidence indicates the weapon was taken from the home of Petitioner's girlfriend, with whom he lived, with her consent, Davis v. State, 236 Ga. at 805. Consent to a search by a co-custodian validates a search. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); Hall v. State, 239 Ga. 832(1)(1977). Petitioner has presented no evidence to vitiate her consent.

Accordingly, this allegation is found to be without merit.

8.

In Count 8, Petitioner contends that the trial court's denial of his motion for funds for experts and investigators deprived him of his constitutional rights.

Denial of a motion for appointment of experts is a matter of trial court discretion and will not be reversed on appeal in the absence of an abuse of that discretion. Welch v. State, 237 Ga. 665, 672 (1976); Westbrook v. State, 242 Ga. 151(1)(1978).

Petitioner makes sweeping claims as to the need for funds for experts yet offers no evidence of harm to

Petitioner from the lack thereof. The Court is unable to determine how such experts would have been helpful because the references to the trial transcript are incorrect. Instead of citing instances where such experts could have benefited Petitioner, the transcript cites refer to testimony about a jury pool. Further, the Court notes that Petitioner was able to present some experts during the resentencing trial. Thus, Petitioner has failed to establish any abuse of discretion by the trial court.

Accordingly, the allegation in Count 8 is wihout merit.

9.

In Count 9, Petitioner alleges that the trial court's denial of his motion for a change of venue denied him his Sixth, Eighth and Fourteenth Amendment rights. This issue has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 382.

10.

In Count 10, Petitioner claims his prior non-capital convictions were illegally introduced in violation of his constitutional rights. This point has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 383-384.

11.

In Count 11, Petitioner charges that the prosecutor made improper, inflammatory remarks in his closing argument which deprived Petitioner of his constitutional rights.

APPENDIX B - p.11

The Court has reviewed the prosecution's closing argument (Vol. XV, 2d Trial 138-160) and concludes his statements are within the bounds of proper argument. A prosecutor may argue for a death sentence and offer plausible reasons for his position. Allen v. State, 187 Ga. 178, 182 (1938); Strickland v. State, 209 Ga. 675(2)(1953); Chenault v. State, 234 Ga. 216(7) (1975). The statements objected to were made during the sentencing phase of the tiral in which a district attorney may urge severe punishment. Chenault v. State, supra.

Accordingly, this allegation is found to be without merit.

12.

In Count 12, Petitioner argues he was indicted by an unconstitutionally composed grand jury.

The right to object to the composition of a grand jury in a habeas proceeding under Georgia law will be deemed waived unless Petitioner shows in the Petition and satisfies the Court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final. Ga. Code Ann. §50-127(1). Such a time limitation on the assertion of a federal constitutional right is permissible, and an additional showing of actual prejudice is required. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

Petitioner has shown no actual prejudice because the Court has before it no evidence indicating

a jury challenge would have been successful. Further, failure of counsel to challenge a grand jury array alone is not "cause" within the meaning of Ga. Code Ann. 550-127(1). Goodwin v. Hooper, supra; Birt v. Hooper, supra; Zant v. Campbell, supra.

This claim for relief is therefore without merit.

13.

In Count 13, Petitioner claims he was tried by unconstitutionally composed traverse juries at both trials.

Petitioner is deemed to have waived his challenge to the traverse jury of his first trial. See (12) above. The issue of the traverse jury at his second trial has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 377.

Accordingly, this allegation is found to be without merit.

14.

In Count 14, Petitioner complains of error in jurors Haynes, Cooper, and Davenport being excused for cause. The Supreme Court has already concluded these jurors were unalterably opposed to capital punishment within the requirements of Witherspoon, supra. Davis v. State, 241 Ga. 380-381.

15.

In Count 15, Petitioner alleges that the trial court's refusal to excuse for cause Jurors Wheelus,

APPENDIX B - p. 13

Ford, Smith, Lasater, Whitmore, and Milam resulted in constitutional deprivation.

The Court has examined each juror's testimony and concludes this allegation is without merit. No juror could be said to have an opinion based on hearsay that was so fixed that it would not be changed by the evidence or charge of the court upon trial, Roach v. State, 221 Ga. 783 (1966); Tennon v. State, 235 Ga. 594 (1975).

16.

The allegation raised in Count 16 has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 382(4).

17.

The allegation raised in Count 17 has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 381.

18.

In Count 18, Petitioner claims that the second trial court's jury instruction concerning the impeachment of witnesses misstated the law and usurped the jury's authority to judge the credibility of witnesses, violating his constitutional rights.

The Supreme Court has already concluded that the jury charge, when read as a whole, was proper. Davis v. State, 241 Ga. at 384.

APPENDIX B - p. 14

19.

In Count 19, Petitioner alleges that the acts of the prosecutors at both trials in striking all blacks from the juries amounted to constitutional deprivation.

Blacks served as jurors in Petitioner's first trial. (First Trial Judge's Report).

A peremptory challenge is an arbitrary and capricious species of challenge to a certain number of jurors allowed to the parties without the necessity of showing any cause therefor. In the very nature of such a challenge no reason need be shown or assigned for the exercise of the right. Hobbs v. State, 229 Ga. 556(6)(1972); Jordan v. State, 235 Ga. 732(1)(1975); Pippin v. State, 151 Ga. App. 225 (1979).

Second trial counsel's testimony that the prosecutor systematically struck all blacks from juries in cases involving white victims and black defendants (H.T. 67-68) is not sufficient to overcome the presumption that the prosecutor is using the State's challenges to obtain a fair and impartial jury. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Jordan v. State, supra.

Accordingly, this allegation is found to be without merit.

20.

The allegation raised in Count 20 has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 384.

APPENDIX B-p.15

21.

In Count 21, Petitioner charges the trial court during the resentencing trial failed to charge the jury properly on the relationship between mitigating and aggravating circumstances or to make clear the jury's verdict was not merely advisory.

Petitioner's first argument was rejected by the Supreme Court in Gates v. State, 244 Ga. 587(6)(1979). There is no requirement that the jury be instructed that mitigating circumstances are to be weighed against aggravating circumstances. Id.

As to Petitioner's second complaint, the trial court instructed the jury:

> "...when a statutory aggravating circumstance is found and a recommendation of death is made, the Court shall sentence the Defendant to death. When a sentence of death is not recommended by the Jury, the Court shall sentence the Defendant to prison for and during his natural life." (Vol. XVI, T.2d Trial, 19). (Emphasis added).
>
> "If you recommend him for the sentence of death, the Court will be required to sentence the Defendant to death by electrocution." (Vol. XVI, T.2d Trial, 20).

The foregoing clearly indicates the jury was instructed their verdict was binding.

This claim for relief is found to be without merit.

22., 23., 24.

In Counts 22, 23, and 24, Petitioner alleges that the death penalty is applied in an arbitrary and

discriminatory manner, pursuant to a pattern on grounds of race, sex, and poverty, and is an excessive penalty.

Petitioner has presented no proof on these issues. Accordingly, these allegations are found to be without merit.

25.

The prosecution-prone argument raised by Petitioner in Count 25 has been rejected by the Supreme Court. Douthit v. State, 239 Ga. 81, 87 (1977); Hawes v. State, 240 Ga. 327(5)(1977).

26.

In Count 26, Petitioner challenges the use of certain prior convictions as an aggravating circumstance.

This issue has already been decided adversely to Petitioner. Davis v. State, 241 Ga. at 383.

27.

In Count 27, Petitioner claims the evidence is insufficient to support his conviction and, thus, the conviction violates his Eighth and Fourteenth Amendment rights.

There is ample evidence to support the jury's finding of the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Accordingly, this allegation is found to be without merit.

APPENDIX B-p.17

28.

In Count 28, Petitioner claims that the 1962 amendment to Ga. Code Ann. §26-906, removing duress as a defense to murder, is unconstitutional.

The Committee Notes following Code Ann. §26-906 expressly address the argument raised by Petitioner. The Committee noted that, "at common law, the defense of coercion was not available to excuse the killing of an innocent person. Blackstone explained the rule as follows: 'He ought to die himself rather than escape by the murder of an innocent.' "

This preference for the common-law rule does not appear in any manner to deprive an accused of due process.

Accordingly, this claim for relief is found to be without merit.

29.

In Count 29, Petitioner complains of impermissible error in the trial court's failure to charge the jury on Petitioner's request of accomplice liability and on the defense of duress/coercion.

There was no evidence to warrant a charge on accomplice liability.

The defense of duress/coercion is not available to an accused charged with murder.

Accordingly, these allegations are found to be without merit.

APPENDIX B - p. 18

30.

In Count 30, Petitioner claims Ga. Code Ann. § 59-805, governing the use of peremptory strikes, is unconstitutional.

This argument was rejected by the United States Supreme Court in Swain v. Alabama, supra.

Accordingly, this allegation is without merit.

WHEREFORE, all allegations in the Amended Petition having been found without merit, the Petition is denied.

SO ORDERED, this 16 day of July, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

GEORGIA CODE PROVISIONS

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(d)

(d) Fees; mileage.--The witness fee shall be $10 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by tender of the fee for one day's attendance plus mileage of 20 cents per mile for traveling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whoses liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

APPENDIX C

P. 1

(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or priviledge which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--

The petition shall identify the proceeding in which the petitionor was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other guthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--

Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

App. C, p. 2

(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

App. C, p. 4

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CURFEW DAVIS,	*	
Petitioner,	*	
vs.	*	
		HABEAS CORPUS No. 4962
WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,	*	
Respondent	*	
	*	
	*	

MOTION FOR FUNDS FOR INVESTIGATION

AND HEARING EXPENSES

Comes now, Curfew Davis and moves this Court for an order declaring Georgia Code Ann. §38-801(d), as amended, unconstitutional on its face and as applied to him, or, in the alternative, for an order awarding him funds with which to pay witness fees and mileage, and moves the Court for an order awarding him reasonable funds with which to pay for necessary investigative work and for consultation, fees and expenses of necessary expert witnesses in the pending habeas corpus proceedings. As grounds therefore, Petitioner shows the following:

I.

Witness Fees and Mileage

1. Curfew Davis is an indigent habeas corpus petitioner challenging his conviction and sentence of death. His petition alleges substantial state law and federal constitutional claims.

APPENDIX D - p. 1

2. The Petitioner was tried and convicted in Troup County, Georgia, and was sentenced to death; he was re-tried on sentencing and again sentenced to death. He is now incarcerated in Butts County, Georgia at the Georgia Diagnostic and Classification Center at Jackson, Georgia.

3. Many of the witnesses necessary for the Petitioner to prove his allegations of illegal and unconstitutional conviction and sentences of death reside in Troup and Coweta Counties, Georgia, and other counties outside of Butts County. Butts County is the county where testimony is to be given.

4. Georgia Code Ann. §38-801(d), as amended, requires that tender of the witness fee ($10.00) plus mileage ($.20 per mile) be served with each subpoena in order for the subpoena to be valid when the witness resides outside the county where the testimony is to be given.

5. Curfew Davis, because of his indigency and his incarceration on death row at the Georgia Diagnostic and Classification Center, is unable to pay the necessary witness fees and mileage.

6. The respondent in this action is exempt from tendering the witness fees and mileage by Georgia Code Ann., Chapter 38 as amended, since the respondent is an officer of the State.

7. The relief requested is necessary to protect Petitioner's rights to compulsory process for the attendance of witnesses on his behalf, a full and fair hearing, effective assistance of counsel, due process and equal protection of law as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

APPENDIX D- p. 2

II.

Investigators and Expert Witnesses

1. The services of an investigator and consultation with and testimony from qualified experts including statisticians, psychiatrists and social scientists will be necessary to prepare and prove the following claims, among others, at the evidentiary hearing in Petitioner's case:

a) Petitioner's claim that he was denied the effective assistance of counsel;

b) Petitioner's claim that his sentence of death was imposed (on re-trial) by a jury drawn from an unconstitutionally composed jury pool, by showing the composition of the traverse jury pool in Troup County, Georgia;

c) Petitioner's claim that striking for cause from the jury panel at Petitioner's trial and re-trial all people with scruples against the death penalty, and the court's refusal to strike for cause jurors who expressed certain fixed opinions concerning punishment, resulted in a jury that was biased in favor of the prosecution on the question of guilt or innocence and sentence.

d) Petitioner's claim that the death penalty is in fact administered and applied in an arbitrary and capricious manner within the State of Georgia.

e) Petitioner's claim that the Supreme Court of Georgia is not properly reviewing cases in which death as punishment is imposed.

f) Petitioner's claim that the population of Troup County was so prejudiced against him that it was impossible for him to receive a fair trial in Troup County;

APPENDIX D – p.3

g) Petitioner's claim that his rights to a fair trial before a neutral and detached judge (and his other equal protection and due process of law rights) were denied by the refusal of the trial court to disqualify the judge at Petitioner's re-trial.

2. The above requested funds for an investigator and expert witnesses are necessary to protect Petitioner's rights to present witnesses on his behalf, a fair proceeding, effective assistance of counsel, due process and equal protection of law as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Petitioner moves this Court to grant an evidentiary hearing on this motion where Petitioner may present evidence on each of the allegations made to grant the relief requested herein.

Respectfully submitted,

Millard C. Farmer
Joseph M. Nursey
Andrea I. Young

ATTORNEYS FOR PETITIONER

15 Peachtree Street, N.E.
Suite 831
Atlanta, Georgia 30303

(404) 688-8116

APPENDIX D - p. 4

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing pleading to counsel for the opposing party, Mr. Arthur K. Bolton, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334; by placing same in the United States Mail with adequate postage attached thereon.

This 7th day of March, 1981.

Joseph M. Nursey
ATTORNEY FOR PETITIONER

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Suite 831
Atlanta, Georgia 30303

(404) 688-8116

P R O C E E D I N G S

10:25 a.m.

THE COURT: This is habeas corpus number 4962, Curfew Davis, Petitioner versus Walter D. Zant, Warden.

Ms. Young, you represent the Petitioner?

MS. YOUNG: Yes, Your Honor. I am Andrea Young and also, is Millard Farmer and Ms. Pamela Arangno.

MS. ARANGNO: A-r-a-n-g-n-o.

THE COURT: And who is here representing the State?

MR. KOHLER: I am Harrison Kohler, Your Honor, representing the Warden.

THE COURT: All right. I knew your name but I had not met you personally.

All right, you may proceed.

MS. YOUNG: Your Honor, before we get started, if we could invoke the rule. I understand the State has one witness here.

MR. KOHLER: I subpoenaed James Weldon, Your Honor, the attorney at Mr. Davis' first trial.

THE COURT: All right, Mr. Weldon, just wait in the hall, please.

Do you have any witnesses?

MS. YOUNG: Yes, Mr. August Siemon.

APPENDIX E - p. 1

Also, this morning, Your Honor, Petitioner has filed a second amendment to this habeas corpus petition, adding three counts. We served the State with the amendment this morning. And it was in the insufficiency of the evidence in the conviction phase of the Petitioner's trial and challenging the statute Georgia Code Annotated 26-9606 which removed duress as a defense to murder. And also, the refusal of the Judge to charge on duress as a defense in Petitioner's conviction.

If I may, I'd like to give a brief history of this case.

THE COURT: I am familiar with it. You may state it if you want to, but I have read all of the reports in this case and am familiar with it.

MS. YOUNG: All right. Well, if I could just briefly go over it, Your Honor.

THE COURT: All right, if you'd like to.

MS. YOUNG: Presently before the Court is the post conviction appeal of Petitioner's first conviction and the second death sentence. He was convicted in 197[illegible] of murder in Troup County, LaGrange, Georgia.

At his first trial, counsel, Mr. Weldon, filed no pre-trial motions including no motion to suppress either statements or physical evidence submitted against the

APPENDIX E - p. 2

Petitioner. The charge of the Judge in the conviction phase was burden shifting and included presumptions which we allege they were violations of Sanstrom and Melaney. In the United States Supreme Court on appeal reversed the death sentence of Mr. Davis, the Petitioner, on the question of Witherspoon, the exclusion of Jurors, in violation of Witherspoon. Weldon was not his counsel in the Supreme Court.

At the second sentencing phase, present counsel, Millard Farmer, represented Petitioner along with David Kendall and Clinton Deveau. The change of venue motion was denied by Judge Knight and the motion to disqualify Judge Knight for prior practices of discrimination against black people was also denied. That was heard before Judge Jackson who heard Petitioner's first trial when he was convicted and given a death sentence. The motion for funds to aid the defense was also denied by Judge Knight and the motion to restrict the introduction of prior convictions of Petitioner into the sentencing phase was also denied. The Jury that convicted the Petitioner at his second sentencing phase, the actual twelve, had no black people on the actual panel of twelve. Motions to challenge the constitutionality of the panel, motions to restrict the Prosecution's action of striking all

APPENDIX E - p. 3

black people and motions with respect to voir dire and challenge for cause by the defense were all conducted in such a way as to result in Petitioner being tried by a Jury of twelve white people. And the death sentence resulted also from this second trial which is being appealed today.

Generally, as Your Honor understands, the Supreme Court in upholding Georgia's death penalty in Gregg versus Georgia approved a system of guided discretion. This guided discretion is not--cannot be followed in Petitioner's case because of the inadequacy of the record because of the ineffectiveness of counsel in the conviction phase which resulted in a record that cannot be sufficiently reviewed by the Supreme Court in their procedure upheld by the United States Supreme Court. The particularity in finding that death is an appropriate punishment in Petitioner's particular case which has been enunciated by the Court, the Supreme Court, in Woodson V. North Carolina, Gardner V. Florida as it stated that it cannot be maintained on the present record.

In addition, the errors in the second sentencing phase in the denial of funds for representation of Petitioner, the admission of prior convictions and the rulings that resulted in the constitution of the Jury

APPENDIX E-p.4

composition have a cumulative impact which resulted in Petitioner's present sentence of death being in violation of the Eighth Amendment, the Fourteenth Amendment, due process. And we have alleged that generally that his conviction not be allowed to stand, conviction and death sentence.

Before the Court today, we have filed a motion for funds for experts and for subpoenas. Subpoenas in Georgia are not valid without the tendering of mileage fees. Petitioner is indigent and cannot provide those fees. And therefore, our hearing today is subject to--the extent of our hearing today is subject to the Court's ruling on that motion. We are prepared to put up evidence on the need for those funds if the Court would hear that.

Generally, the highlight of the kind of claims that need to be resolved in this hearing and that are particularly contingent on the motion for funds is the claim of the ineffective assistance of counsel in the first trial, the conviction phase, the record in that trial is not complete. We would need the transcribing of oral argument and to subpoena the Court Reporter to testify on that particular issue. In addition, on the issue of the disqualification of Judge Knight with the presiding of Judge Jackson over that hearing, we would

need to be in a position to subpoena both Judge Knight and Judge Jackson on that issue. As to the Jury challenge, the unconstitutional composition of the Jury, Petitioner has shown in motions in the sentencing phase of the trial that the Jury composition was 13 percent black; 13.7 of the Jury pool and 30 percent black in the community. All names were identified but there was a problem with testimony because of the inability to subpoena and have funds to have direct testimony of personal knowledge of each individual on the Jury pool. And that remains a problem until today and at this hearing in making out our claim on the Jury challenge.

The validity of prior convictions has been challenged and these convictions were admitted in the sentencing phase of Petitioner's present death sentence. Subpoena power would be necessary to make out that claim.

In addition, the issue of prosecution and conviction proneness of the Jury through the process of Jury selection, there would also be experts necessary to testify on those major issues.

No--Petitioner is not--by highlighting those particular counts, we are not in any way waiving each and every count in the petition but those are just particular highlights of what is needed on that motion. So at this point, if we could call our witness, unless

Your Honor would prefer otherwise.

We can stipulate to the need of these witnesses if the Court and the prosecution would--

THE COURT: If you would like to present evidence in support of your motion, the Court will be glad to let you do so. If Mr. Kohler is willing to stipulate to anything you could present, sworn testimony concerning those things you have stated, we could dispense with the need of it.

Can you do that, Mr. Kohler?

MR. KOHLER: Judge, I'm not clear exactly as to what I'm asked to stipulate. I want to expedite the proceedings as much as I can.

THE COURT: Mr. Farmer or somebody and I expect it to be Mr. Farmer will testify about if they had money they could subpoena witnesses to come and be in a better position to prove some of the allegations in the petition, particularly having to do with the composition of the Jury, motions to recuse Judge Jackson and Judge Knight, and all the other matters she just went through.

MR. KOHLER: Judge, I would be willing to stipulate that if they had money, they could certainly make subpoenas binding and make these people come into court to testify. I don't want to stipulate that

they could make out their case by having these people come to court.

THE COURT: They're not asking you to make any such stipulation.

MR. KOHLER: But I would be willing to stipulate if they had funds, they could make subpoenas binding and make these people come to court to appear before you.

THE COURT: Ms. Young, if you think that is sufficient, we can move on. If not, you can present your witness.

MS. YOUNG: Yes, Your Honor, that will be--that there is the money necessary for the subpoena and also for the expenses of experts that would be needed in support to testify on the counts alleged in the petition, and that those would be necessary for a full and fair hearing on this petition.

THE COURT: Well, he isn't going to stipulate that those things are necessary for a full and fair hearing. I think Mr. Kohler will stipulate that if you had money, you would have a better chance of retaining the services of expert witnesses. He doesn't stipulate that they are expert or that it is germaine to the proceedings.

MS. YOUNG: The testimony of our witnesses would

be that those things are necessary for us to make out the counts alleged in our petition.

THE COURT: Mr. Kohler, can you stipulate to that? I think it would probably save time.

MR. KOHLER: Yes, sir. I would assume that's what--if they say that's what their witness is going to testify, I will stipulate--I will be willing to not challenge that but I would not agree to the correctness of the testimony but I would agree that--

THE COURT: You do agree that if they had funds, they could get somebody to come and give such testimony.

MR. KOHLER: I assume so, Your Honor.

THE COURT: All right. Is that good enough?

MS. YOUNG: Yes, Your Honor. Thank you.

THE COURT: Are you ready, then, to proceed on the petition?

MS. YOUNG: Yes, Your Honor. Mr. Farmer will call the first witness.

THE COURT: Mr. Farmer?

MR. FARMER: Yes, sir, Your Honor. The State has subpoenaed Mr. Weldon here today and we call him for the purpose of cross examination.

THE COURT: All right.

MR. KOHLER: Your Honor, I don't believe at this

APPENDIX E -p.9